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PACIFIC TELESIS
Group-Washington

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Federal Communications Commission
Office of Secretary

January 3, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Re: CC Docket No. 96-237, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996

On behalf of Pacific Telesis Group, please find enclosed an original and six copies of its "*Reply Comments*" in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Jay Bennett

Enclosure

cc: Thomas J. Beers
Kalpak Gude
Scott K. Bergmann w/Diskette

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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Infrastructure	)	
Sharing Provisions in the	)	CC Docket No. 96-237
Telecommunications Act of 1996	)	
	)	

REPLY COMMENTS OF PACIFIC TELESIS GROUP

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TABLE OF CONTENTS

SUMMARY

Pacific Telesis Group's reply focuses on comments and recommendations that 1) impermissibly link the implementation of Section 259 with Section 251; 2) attempt to inject the Commission in the pricing of negotiated agreements; 3) are inconsistent with Section 259; and 4) propose unnecessary notice requirements.

The Commission should reject all attempts to link Section 259 with Section 251. Although both sections permit access to a LEC's facilities, they have distinctly different goals and purposes and should be implemented separately. The history of infrastructure sharing legislation clearly indicates that universal service considerations motivated Congress in enacting Section 259 -- not the promotion of competition as MCI suggests. MCI cannot provide any statutory support for its assertions that "Congress intended the Commission to implement rules permitting information on terms more favorable than they would receive, either under Section 251 or under any agreement among non-competing LECs prior to the passage of the 1996 Act" or that "the purpose of Section 259 is to provide a mechanism to share the benefits of competition expected subsequent to Section 251 negotiations, with more expensive, hard-to-serve customers that may not have more than one local exchange company to choose from."

The Commission should reject MCI's suggestion that the Commission apply its Part 51 standard of technical feasibility for access to LEC facilities shared under Section 259. There is no need to apply a standard of technical feasibility to Section 259. The 1996 Act does not require it nor is it necessary to support a qualifying carrier's request.

The Commission should reject ALTS' suggestion that the fact that a qualifying carrier obtains infrastructure pursuant to Section 259 should serve as prima facie evidence that

such services can and should also be made available by the providing LEC for any purpose pursuant to Section 251. This is a belated attempt to amend the Interconnection Order, which did not provide that Section 259 would serve as a basis for a Section 251 obligation. This suggestion is also unreasonable. Each request and a providing LEC's ability to meet the request will vary depending on specific circumstances. The fact that the providing LEC could meet one infrastructure sharing request should not mean that it automatically should be required to meet any other request.

Contrary to MCI's recommendation, the Commission should not inject itself into the pricing of negotiated services. National pricing rules for Section 259 is as ill-advised as national pricing is for Section 251. MCI's proposal for short-run incremental cost, without recovery of profit or common costs, would violate the statutory requirement that the Commission not require a LEC "to take any action that is economically unreasonable or that is contrary to the public interest." Section 259(b)(1). In addition, denying a return on investment would be economically burdensome, unreasonable, unconstitutional and contrary to the express terms of Section 259. Indeed, the Commission should abstain from establishing any pricing regulations at all. The Commission should let the parties negotiate pricing given the unique requirements of each qualifying carrier and the arrangements necessary to meet those requirements.

The Commission should reject recommendations that are not consistent with Section 259 such as ALTS' proposal that a qualifying carrier be permitted to use Section 259 services and facilities for any purpose and anywhere. Section 259 expressly forbids a qualifying carrier from unilaterally deciding to use shared infrastructure outside of its universal service area. The legislative history of the infrastructure sharing provision is equally clear. A qualifying carrier may use a providing LEC's infrastructure outside the qualifying carrier's universal service territory if the providing LEC agrees or pursuant to Section 251.

The Commission should also reject NCTA's recommendations that a qualifying carrier must make infrastructure acquired under Section 259 available to a requesting competitive LEC ("CLEC") within the qualifying carrier's market pursuant to Section 251 and that if a qualifying carrier shows that it would be infeasible to permit a requesting CLEC to use the particular function obtained under Section 259, the CLEC should be permitted to obtain that function directly from the same providing LEC that provided it to the qualifying carrier. These proposals attempt to rewrite Section 259 to require providing LECs to indirectly enter into infrastructure sharing agreements with carriers that do not meet the statutory requirement of a qualifying carrier. If Congress had intended Section 259 to be an entitlement for carriers that do not have universal service obligations, Section 259 would not carefully describe qualifying carrier eligibility requirements.

The Commission should also reject NCTA's attempt to limit the eligibility of qualifying carrier. Nothing in the Act suggests the additional limitations that NCTA proposes. The Commission cannot rewrite Congress' definition of a qualifying carrier.

The Commission should not require a providing LEC to notify qualifying carriers about planned deployment before a providing LEC's make/buy point. Contrary to the intent of this suggestion, Section 259 does not require joint planning. Notice before a providing LEC's plans are firm also could be unnecessarily disruptive to qualifying carriers.

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REPLY COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group (''Pacific") respectfully submits its reply in response to comments filed in this docket.[1] The comments evidence singular agreement on many issues, including commentors' strong preference that qualifying carriers and providing LECs continue to negotiate the terms and conditions of their infrastructure sharing agreements without specific rules from the Commission. Our reply focuses on comments and recommendations that 1) impermissibly link the implementation of Section 259 with Section 251; 2) attempt to inject the Commission in the pricing of negotiated agreements; 3) are inconsistent with Section 259; and 4) propose unnecessary notice requirements.

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[1] *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, CC Docket 966-237, *Notice of Proposed Rulemaking*, FCC 96-456 (released November 22, 1996) ("NPRM").

I. THE COMMISSION SHOULD REJECT ATTEMPTS TO LINK SECTION 259 WITH SECTION 251

A few commentors attempt to portray Section 259, the infrastructure sharing provision of the 1996 Act,[2] as intended primarily to promote competition. They suggest that the Commission apply its rules for Section 251 (which requires interconnection, unbundling and resale by LECs to potential competitors) to Section 259. Although Sections 259 and 251 both permit access to a LEC's facilities, they have distinctly different goals and purposes and should be implemented separately. Commentors' attempts to link the two sections ignore an important goal of the 1996 Act -- the promotion of universal service. As we described in our comments,[3] the history of infrastructure sharing legislation clearly indicates that universal service considerations motivated Congress in enacting Section 259. Section 259 intended to enable local exchange providers that lack economies of scale or scope to bring higher cost advanced telecommunications services to their customers. Thus, we agree with ALLTEL that infrastructure sharing is primarily about elevating the service offerings available in small and rural markets beyond those which the qualifying carrier's economies of scale and scope would otherwise permit. ALLTEL, p. 2.

The Commission should reject MCI's misplaced suggestions linking Section 259 with Section 251 rules. First, MCI suggests that the Commission should make its rules regarding

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[3] Comments of Pacific Telesis Group, December 20, 1996, pages 2-4.

access to services adopted in Part 51[4] available to qualifying carriers. MCI posits that "Congress intended the Commission to implement rules permitting information on terms more favorable than they would receive, either under Section 251 or under any agreement among non-competing LECs prior to the passage of the 1996 Act." MCI, however, cannot provide any statutory support for this notion because there is none. Congress's intent to promote universal service is in no way dependent on what the Commission decided for Section 251.

MCI also fails to provide any support for its second erroneous contention that "the purpose of Section 259 is to provide a mechanism to share the benefits of competition expected subsequent to Section 251 negotiations, with more expensive, hard-to-serve customers that may not have more than one local exchange company to choose from." MCI develops these fanciful constructions to justify its recommendation that Section 251 rules serve as a minimal baseline for infrastructure sharing arrangements. MCI, p. 4. There is no reason to require the rules implementing Section 251 to apply to Section 259 because a qualifying carrier has the option of obtaining infrastructure pursuant to either section.

MCI recommends that the Commission apply its Part 51 standard of technical feasibility for access to LEC facilities shared under Section 259, so long as the services and facilities would be required under Section 251. MCI, p. 7. The Commission should reject MCI's suggestion because it attempts to add requirements to Section 259 that are not part of the Act. Moreover, if, as MCI says, "facilities are required to be provided under Section 251," the qualifying carrier can and should use Section 251 to obtain the requested infrastructure. There is

[4] MCI specifically refers to Sections 51.305, .323, .405, .501, .515, .601, .617, .701 and .171. MCI, page 4.

no need to apply a standard of technical feasibility to Section 259. The 1996 Act does not require it nor is it necessary to support a qualifying carrier's request.

ALTS suggests that the fact that a qualifying carrier obtains infrastructure pursuant to Section 259 should serve as prima facie evidence that such services can and should also be made available by the providing LEC for any purpose pursuant to Section 251. The Commission should reject this suggestion as a belated attempt to amend the *Interconnection Order,*[5] which did not provide that Section 259 would serve as a basis for a Section 251 obligation. The Commission should also reject the suggestion as unreasonable. Each request and a providing LEC's ability to meet that request will vary depending on the carriers' specific circumstances. The fact that the providing LEC could meet one request should not mean that it automatically should be required to meet any other request.

Congress' efforts to make advanced telecommunication services available by adopting Section 259 should not take a back seat to the 1996 Act's general goal of strengthening competition. The Commission should not adopt any recommendation that would promote competition above universal service for Section 259.

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Dockets No. 96-98, 95-185, *First Report and Order*, released August 8, 1996 ("*Interconnection Order*") pet. for review pending, *Iowa Utilities Board v. FCC, et al.*, No. 96-3321 and consolidated cases (8th Cir. filed September 6, 1996).

II. THE COMMISSION SHOULD NOT INJECT ITSELF INTO THE PRICING OF NEGOTIATED SERVICES

Most commentors agree that infrastructure sharing between LECs and non-competing qualifying carriers will continue to be best accomplished by permitting the parties to negotiate the terms and conditions of their agreements. While MCI recognizes that negotiation will be the primary mode to establish Section 251 agreements, it suggests that the Commission should become involved in pricing in order to implement the requirement that qualifying carriers fully benefit from LECs' economies of scale and scope. MCI, pp. 8-9.

MCI recommends that the Commission should price infrastructure, suggesting short-run incremental costs for infrastructure provided under Section 259 and TSLRIC for infrastructure provided under Section 251. MCI, p. 9. MCI's recommendation that the Commission establish national pricing rules for Section 259 is as ill-advised as national pricing is for Section 251. The pricing rules for Section 251 are currently under appellate review. *Iowa Utilities Board v. FCC, et.al.,* No. 96-3321 and consolidated cases (8th Cir. filed September 6, 1996).

MCI proposes that short-run incremental cost, without recovery of profit or common costs, is required for a qualifying carrier to receive the full benefit of economies of scale and scope. MCI, p. 9. This proposal would violate the statutory requirement that the Commission not require a LEC "to take any action that is economically unreasonable or that is contrary to the public interest." Section 259(b)(1). As the Commission tentatively concluded, it would be economically unreasonable and contrary to the public interest to deny a providing LEC the opportunity to recover costs it will incur. NPRM, para. 20. In addition, denying a return on investment would be economically burdensome, unreasonable, unconstitutional and contrary to the express terms of Section 259.

The Commission should not adopt MCI's general endorsement of national pricing rules for infrastructure sharing agreements nor its specific recommendation of short-run incremental cost. Indeed, the Commission should abstain from establishing any pricing regulations at all. The Commission should let the parties negotiate pricing, given the specific and unique requirements of each qualifying carrier and the arrangements necessary to meet those requirements.

III. THE COMMISSION SHOULD REJECT RECOMMENDATIONS THAT ARE NOT CONSISTENT WITH SECTION 259

ALTS proposes that a qualifying carrier should be permitted to use Section 259 services and facilities for any purpose and anywhere -- a proposal that would turn Section 259 (a) on its head. Section 259 expressly forbids a qualifying carrier from unilaterally deciding to use shared infrastructure outside of its universal service area. Section 259 clearly provides that a qualifying carrier may only use the incumbent LEC's infrastructure: "...in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under Section 214(e)." The "service area" is the qualifying carrier's universal service area. The legislative history of the infrastructure sharing provision is equally clear: "The qualifying carrier may request such sharing for the purpose of providing telecommunications services or access to information services *in areas where the carrier is designated as an essential telecommunications carrier under new section 214(d).*" S. Conf. Rep. No. 104-458, 104th Cong., Sess. 1 (1996) at 137 (emphasis added). ALTS seeks to avoid the clear language of Section 259 by suggesting that the qualifying carrier pay the providing LEC for such use pursuant to the pricing standards of Section 251 when the qualifying carrier uses such services outside of its universal service territory. But the suggestion fails. ALTS, pp. 1, 3. A qualifying carrier wishing to use a providing LEC's infrastructure outside the qualifying carrier's universal service territory may do so if the providing LEC agrees or pursuant to Section 251. A qualifying carrier may not, however, unilaterally use infrastructure obtained pursuant to Section 259 outside its universal service area.

NCTA's recommendations are also inconsistent with Section 259. First, NCTA proposes that a qualifying carrier must make infrastructure acquired under Section 259 available to a requesting competitive local exchange carrier ("CLEC") within the qualifying carrier's market pursuant to Section 251. NCTA, p. 4. NCTA does not, however, limit that requirement to CLECs with universal service obligations. By its proposal, NCTA would rewrite Section 259 to require providing LECs to indirectly enter into infrastructure sharing agreements with carriers that do not meet the statutory requirement of a qualifying carrier. NCTA's second proposal has the same flaw. NCTA proposes that if a qualifying carrier shows that it would be infeasible to permit a requesting CLEC to use the particular function obtained under Section 259, the CLEC should be permitted to obtain that function directly from the same providing LEC that provided it to the qualifying carrier. NCTA, p. 5. Once again, NCTA does not limit this entitlement to CLECs with universal service obligations. We have no objection to this requirement provided that the CLEC is eligible in its own right as a qualifying carrier, subject to universal service obligations. However, the Commission should not permit Section 259 to be an entitlement for carriers that do not have universal service obligations. If Congress had intended that, Section 259 would not carefully describe eligibility for qualifying carrier status. Section 251, which makes infrastructure available to carriers that do not have universal service obligations, is an option to meet NCTA's objective in this circumstance.

The Commission should also reject NCTA's attempt to limit the eligibility of qualifying carriers. Although, by its previous proposals, NCTA attempts to garner the benefits of infrastructure sharing for its member companies, NCTA nonetheless asks the Commission to limit infrastructure sharing and the promotion of universal service. NCTA recommends stringent qualifications that will limit the number of qualifying carriers. It proposes that qualifying carrier status only apply to a rural telephone company, as defined in the Communications Act, that serves, in combination with its affiliates, fewer than two percent of the Nation's subscribers lines installed in the aggregate nationwide; and then only if it can show that it would be economically unreasonable for it to deploy the capability, feature or function sought in the agreement because it lacks economies of scale or scope. NCTA, p. 3. Moreover, the carrier would have to demonstrate that the requested capability cannot otherwise be obtained from the adjacent incumbent LEC under Section 251. NCTA, p. 6. Nothing in the 1996 Act suggests the additional limitations that NCTA proposes. The Commission cannot rewrite the statutory definition of a qualifying carrier. Indeed, Congress' goal for Section 259 suggests that more, not fewer, entities should be the beneficiaries of infrastructure sharing. If NCTA believes that CLECs seeking to enter local telephone markets in small towns and rural areas should have the benefit of the infrastructure sharing provisions, it should urge its rural members to take on the universal service obligations that are the cornerstone of qualifying carrier status or to seek amendment of the 1996 Act.

IV. EXISTING NOTICE PROVISIONS ARE SUFFICIENT

The Rural Telephone Coalition ("RTC") recommends that a providing LEC should notify qualifying LECs about planned deployment when the providing LEC's plans are firm but before the make/buy decision point. The providing LEC could then still modify its plans if necessary to accommodate a request by a qualifying carrier. RTC, p. 17. While an earlier notice provision could be a term of the parties' negotiated agreement, the Commission should not include this requirement in any general guidelines. First, there is no statutory requirement for joint planning pursuant to Section 259 because the provision clearly states that only existing facilities are subject to infrastructure sharing. Second, the make/buy point may be the earliest time when a providing LEC's plans are firm. Any earlier notice also could be unnecessarily disruptive to qualifying carriers. Third, under RTC's proposal, the providing LEC could lose control of its network planning which would be harmful to network efficiency for all customers. RTC's proposal is another example of why negotiations between the parties, and not specific rules, will result in efficient and satisfactory infrastructure sharing agreements.

V. CONCLUSION

In enacting Section 259, Congress intended to primarily promote universal service so that customers of companies lacking economies of scale or scope would have access to advanced telecommunications services. Congress also clearly indicated its intent to promote infrastructure sharing through cooperation between the companies. The best way for the Commission to implement Congress' intent is to develop only minimal guidelines that will enhance cooperation and the negotiation process. Other than issuing general guidelines, the

Commission should permit carriers to continue to reach infrastructure sharing agreements as they have successfully done in the past. The Commission should then hold itself available to resolve disputes between the parties, if any arise.

Respectfully submitted,

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